

1747. *January 14.* The CORPORATIONS of Mary's Chapel *against* KELLIE.

IN an action before the Sheriff of Edinburgh, at the instance of the corporations of Mary's Chapel, against John Kellie wright in Portsburgh, a decree was obtained in the year 1743 against the defender, finding it proved, ' That in ' September 1742 he had, by himself and servants, incroached upon the exclusive ' rights and privileges of the corporation of freemen wrights in the city of Edin- ' burgh, by taking out eight sash windows in the house of William Robertson ' writer, in the Old Assembly-close in Edinburgh, taking down what part of ' the lining was necessary at the sides above and below the windows, and by ' inputting eight new sash-windows in place of the old ones, and refitting and ' putting up the lining; and finding the defender liable in the pursuer's dama- ' ges and expences, and modifying the same to L. 20 Sterling.'

At discussing the suspension of this decree, the corporation founded on their *Seal of Cause*, being an act of the town-council in 1633, referring to former grants and acts of the town-council in 1475 and downwards, confirmed by K. Ch. I. in 1635, by charter under the Great Seal, ratified by act 11. Parliament 1641, whereby all persons are inhibited from working within the burgh in any of the crafts of the incorporated trades, particularly of wrights and masons, but such as are admitted freemen of the corporation, or under the direction of free- men; and on the uniform practice of the burgh, and of all the burghs in Scot- land with respect to this exclusive privilege.

On the other hand, the suspender *contended*, that the seal of cause imported no more than a prohibition to unfreemen to work at their own hand, which the magistrates may lawfully forbid, but not a prohibition to the inhabitants to employ whom they please, which would be an infringement on the natural liberty of the subject.

In support of which construction of the seal of cause, it was *observed*, that the act of Parliament 1540, c. 111. it is declared to be the privilege of the inhabi- tants of royal burghs to employ whom they please, freemen or others, in the building or repairing of houses, which act is ratified by another in the 1607;* and this last act being but 26 years before the seal of cause, it could not be thought that the town-council would take upon them to bestow privileges upon their wrights and masons in the face of so recent a statute.

Two decisions were also appealed to by the suspender; one in 1726, between the present chargers and the wrights of Portsburgh, which is a burgh of barony, and not subject to the statute 1592, which discharges the exercise of crafts in suburbs of royal burghs; where it was found that the freemen of Portsburgh may import on any day of the week, such work as they are employed to make by the inhabitants of Edinburgh, concerning which there is a finished bargain of sale by an agreed price: And another between the shoemakers of Edinburgh

No 64.
Corporations are entitled to debar unfreemen, from encroaching on their employment within burgh, and may prevent the inhabitants from employing them.

No 64.

and shoemakers of Calton, where it was found to the same purpose, but that they could not import shoes for sale, except on a market day. These decisions, in the case of importing made work, were argued to apply equally to the case of employing unfreemen to work within burgh, since the employing the workmen is the foundation of both; and *separatim*, the sash-windows being made work, these decisions applied directly to the present case: For, if they could be imported, there lay no complaint against putting them in, more than there would lie against a clockmaker, from whom a clock was bought, for setting it up; or against a joiner, employed to make a coffin, for screwing down the head of it upon the dead body.

And, *lastly*, a passage in Sir George Mackenzie's Observations on the act 80, Parliament 5. James I. was appealed to, where he observes it to have been found between the Lord Hatton and the Deacon of the masons of Edinburgh, that a man might choose any stranger mason to build his house.

Answered for the chargers, That the words of the seal of cause could admit of no such limited construction, and still less would the intention thereof admit it. For as masons and slaters, and some others, set up no shop, and do no work but where they are employed, the freeman would have no privilege at all if an unfreeman could work when employed; on the contrary, he would be in a worse case than the unfreeman, who, not being liable to watching and warding, quarter-dues and office-bearing, would be able to work at a cheaper rate than the members of the corporation: Nor is the seal of cause any restraint on natural liberty other than occurs in all societies, and without which government cannot be maintained, *e. g.* none but members of the faculty of advocates can plead causes, nor any person practise as a physician who is not licensed by the college.

That the act 1540 is conceived in loose terms, but has generally been understood as only intended to correct an abuse which prevailed in those days by the combination of the craftsmen of all the different professions both in burghs and in the country, that no tradesman, though a freeman, should undertake the building or reparation of a house which another had begun; which, as it was in itself unlawful, and attended with inconvenience to the lieges, was remedied by the act, and liberty given, where a craftsman had begun a work and delayed to end it, to employ any other (freeman or unfreeman) that is any freeman in burgh or unfreeman in the country to end it. And the more just observation from the short time intervening between the act ratifying that of 1540, and the seal of cause, is, that the act 1540 has then been so understood; and so Sir George M'Kenzie, in his Observations upon the act itself, explains it. But if there were a doubt about the matter, it is removed by the uniform practice of all the royal burghs, and the general acquiescence of the nation, which was enough to turn the statute into desuetude, had it been ever so express in favour of unfreemen.

That the decisions in the case of Portsburgh and Calton were not founded on the tradesmen's being employed, but on this, that it was never understood that

all commerce was forbid between inhabitants of a burgh and unfreemen in the neighbourhood, as it would be unreasonable that one might import, *e. g.* from London, made work, and be at the same time debarred from purchasing the same from any of the lieges ; nor were the sash-windows in the present case compleated work, of which only the decisions are to be understood, as there was a further operation necessary about them than merely their being set up.

THE LORDS ' having considered the Seal of Cause, charter under the Great Seal, and act of Parliament ratifying the same, with the declarations concerning the practice in other royal burghs,' (which, when before the Ordinary, both parties had agreed to hold as proof), ' and writs produced for, instructing the practice of the town of Edinburgh of debarring unfreemen from working in building or repairing houses within the burgh, and that the suspender has produced no evidence of a contrary practice in any of the royal burghs, repelled the reasons of suspension.'

The suspender reclaimed and pleaded at least to have the letters suspended: as to damage and expence, on this ground, That the penalty in the seal of cause is no other than forfeiture of the work the unfreeman shall be found working, setting up, or bringing in, not on the market-day, one half to the town, and the other to the poor of the corporation, and punishment of the person at the discretion of the magistrates ; and that Judges have no power to add to the penalty by decreeing damages, nor are damages in this case capable of liquidation ; and that as to the expence, of which alone they could consist, the question was of that dubious nature as not to entitle the chargers to expence.

THE LORDS, of this date, ' refused the petition without answers.'

Kilkerran, (BURGH ROYAL.) No 5. p. 102.

* * D. Falconer reports the same case :

THE incorporated Trades of Mary's Chapel in Edinburgh brought an action before the magistrates, against John Kelly, wright in Portsburgh, for that he being employed by an inhabitant, had made frames for eight sash-windows, and had set up and fixt them in a house within the city, contrary to the privileges of the incorporated wrights, and thereupon obtained decret for L. 20 Sterling of damages, which was suspended ; and the Lord Ordinary, 17th January 1745, ' Having considered the chargers' Seal of Cause, charter under the Great Seal, and act of Parliament ratifying the same, with the declarations concerning the practice in the royal burghs, and writs produced for instructing the constant practice of the burgh of Edinburgh, of debarring all unfreemen, in terms of the said seal of cause ; and that the defender had produced no evidence of a contrary practice in any of the royal burghs of Scotland, repelled the reasons of suspension, in so far as the same were founded on act 111. James V. or act 4. P. 19. James VI.'

No 64.

Pleaded in a reclaiming bill, That, by these acts, any persons were allowed to be employed in the building and repairing of houses. *2dly*, That complete pieces of work might be brought in by strangers, and delivered; and the frames being by him sold to his employer, it were absurd to allege he could not set them up, though it might be necessary to take down a pannel for that purpose.

Answered, That the acts were in desuetude, and frames of windows were not such pieces of work as might be bought from unfreemen, such as cabinets for example, but were parts of the house.

THE LORDS adhered.

Act. Lockhart.

Alt. H. Home.

Clerk, Forbes.

Fol. Dic. v. 3. p. 106. D. Falconer, v. 1. No 154. p. 197.

1749. February 10. The MALTMEN OF GLASGOW *against* ROBERT TENANT.

No 65.

The maltmen being in Glasgow a corporation, it was found, that an inn-keeper might make malt for his own use; but if he distilled or brewed it, and sold the ale or spirits, he must enter with the incorporation.

THE visiter and collector of the maltmen calling of Glasgow, pursued Robert Tenant, inn-keeper there, before the Magistrates, and obtained him to be fined in L. 20 Scots, for making malt without being entered with the calling: Which he suspended; for, that by act 29. Parliament 1567. ratified by act 15. Parliament 1669, it is statute, that maltmen should be no craft nor have a deacon.

THE LORD ORDINARY, 17th November 1748, 'sustained the reason of suspension founded on the act of Parliament, notwithstanding of a ratification 'passed in the Parliament 1672, founded on by the chargers.'

Pleaded in a reclaiming bill: There was a decret arbitral pronounced 1605, betwixt the Merchants and Trades of Glasgow, by which the constitution of the town was settled as it subsists to this day; part whereof is, that there are six maltmen, members of the convener's house, that they are capable of being chosen deacon convener, who is a counsellor *ex officio*, and of being trades bailies: By this agreement the maltmen and mealmen are allowed to have a visiter, and the burgesses who use these employments are obliged to pay them certain small upsets. It was approved by the magistrates, recorded in the council-books of the town, and ratified in Parliament 1612. On occasion of the statute 1669, the calling applied to Parliament, and obtained a ratification of their privileges 1672; which they have possessed ever since, and got confirmed by the bishop 1684. In 1677, the magistrates settled the upset at L. 100 Scots.

Answered: The ratifications ought not to derogate from public law; and so was found in the House of Peers, in the competition for the honour of Earl of Stair, which was resigned, and granted again by patent to the then Earl, and any person he should name, by a writ under his hand; and failing that, to the second son of Colonel William Dalrymple; ratified in Parliament: In which case the House of Peers preferred the substitute to the Earl's nominee. *See* PERSONAL and TRANSMISSIBLE.